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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 6, 2002

PETITION OF

US LEC OF VIRGINIA INC.

CASE NO. PUC-2002-00105

For Arbitration Pursuant to
§ 252(b) of the Telecommunications
Act of 1996 to Establish an
Interconnection Agreement with
Verizon Virginia Inc. and
Verizon South Inc.

ORDER OF DISMISSAL

On May 24, 2002, US LEC of Virginia Inc. ("US LEC") filed with the State Corporation Commission ("Commission") a Petition for arbitration of unresolved issues in its interconnection negotiations ("Arbitration Petition") with Verizon Virginia Inc. ("Verizon Virginia") and Verizon South Inc. ("Verizon South") (collectively, "Verizon") pursuant to § 252(b) of the Telecommunications Act of 1996¹ and §§ 5-400-180 and 5-419-10 et seq. of Title 20 of the Virginia Administrative Code. US LEC requests that the Commission resolve its dispute with Verizon by: (i) adopting an interconnection agreement between US LEC and Verizon reflecting the undisputed contract language shown in Exhibit B to the Arbitration Petition; (ii) resolving the disputed issues; (iii) affirmatively ordering the parties to

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. § 151 *et seq.* ("Act").

submit an interconnection agreement for approval by the Commission in accordance with Section 252(e) of the Act; and (iv) retaining jurisdiction until Verizon has complied with all implementation time frames specified in the arbitrated interconnection agreement and has fully implemented the terms of this agreement.

On June 18, 2002, Verizon filed its Response to the Arbitration Petition of US LEC. Verizon admits that the draft interconnection agreement attached to the Arbitration Petition as Exhibit B accurately reflects the parties' negotiation to date, except that the parties have settled issue 9. Verizon's response addresses the eight remaining issues.

US LEC brings its Arbitration Petition pursuant to 47 U.S.C. §§ 251 and 252 and the effective rules implementing these provisions of the Act, issued by the Federal Communications Commission ("FCC") in its Local Competition Order.² US LEC also relies upon this Commission's Procedural Rules for Implementing §§ 251 and 252 of the Act (20 VAC 5-419-10 et seq.) and Rules Governing the Offering of Competitive Local Exchange Telephone Service (20 VAC 5-400-180). 20 VAC 5-400-180 F 6 provides for our "arbitration" of contested

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) hereinafter the "Local Competition Order."

interconnection matters.³ US LEC submits its Arbitration Petition for consideration according to the Act and not simply under state law. US LEC recognizes in its Arbitration Petition that the Commission may choose to decline to exercise jurisdiction over this matter and instead refer it to the FCC.⁴ US LEC states that it does not oppose such consideration of the Arbitration Petition by the FCC and requests that our determination be made on an expedited basis.

The Commission has declined to waive sovereign immunity under the Eleventh Amendment to the Constitution of the United States. We have avoided waiver of our immunity and explained our reasons in the Commission's Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al., For Arbitration with Verizon Virginia, Case No. PUC-2000-00282,

³ As discussed in our Order of June 15, 2000, in Case No. PUC990101, Petition of Cavalier Telephone, LLC, for arbitration of interconnection rates, terms, and conditions, and related relief, the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons."

⁴ US LEC cites our recent dismissal of the Global NAPs' Arbitration Petition. See Petition of Global NAPs South, Inc., for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Virginia Inc., Case No. PUC-2002-00001, Preliminary Order (Va. SCC Feb. 20, 2002) at 2-3. See also, Id., Order of Dismissal (Va. SCC March 20, 2002). Thereafter, Global NAPs filed on June 19, 2002, a Petition, pursuant to § 252(e)(5) of the Act requesting the FCC to preempt this Commission and arbitrate an interconnection agreement between itself and Verizon Virginia. See Public Notice, rel. July 2, 2002, DA02-1567, WC Docket No. 02-180.

issued December 20, 2000, ("AT&T Dismissal Order").⁵ We repeat below our holding in the AT&T Dismissal Order in which we declined to exercise jurisdiction.

As stated in our November 22, 2000, Order, until the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. (AT&T Dismissal Order, p. 2)

In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. ___, 70 USLW 4432 (2002) ("Verizon Md. v. PSC of Md."), the Supreme Court held that the federal courts have jurisdiction under 28 USC § 1331 to review state commission orders for compliance with the Act or with an FCC ruling issued thereunder⁶

⁵ On July 17, 2002, the FCC released the first of two orders (its non-pricing order) on AT&T's Arbitration Petition. See Memorandum Opinion and Order by the Chief, Wireline Competition Bureau, CC Docket No. 00-251.

⁶ While Verizon Md. v PSC of Md. was decided on the state commission's enforcement of an interconnection agreement, this decision may suggest federal court jurisdiction under 28 USC § 1331 also applies to a state commission's arbitration of an interconnection agreement as well. The Supreme Court noted in by-passing a determination of whether § 252(e)(6) applied to enforcement actions:

...none of the other provisions of the Act evince any intent to preclude federal review of a commission determination. If anything, they reinforce the conclusion that § 252(e)(6)'s silence on the subject leaves the jurisdictional grant of § 1331 untouched. Section 252(e)(4) provides: "No State court shall have jurisdiction to review the action of a state commission in approving or rejecting an agreement under this section." In sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies (footnote omitted).

and that suit against individual members of the state commission may proceed under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). However, Verizon Md. v. PSC of Md. did not disclose whether state commissions waive their sovereign immunity by participating in § 252 matters nor whether Congress effectively divested the states of their Eleventh Amendment immunity from suit under § 252 of the Act.⁷ We now await the Fourth Circuit Court's determination following remand of Verizon Md. v. PSC of Md. by the Supreme Court. The Fourth Circuit Court of Appeals may yet offer us further insight into the condition of state immunity under the Eleventh Amendment.

The parties to the present case may elect to proceed with arbitration by the FCC under the Act in lieu of this Commission, or the parties may pursue resolution of unresolved issues pursuant to 20 VAC 5-400-180 F 6. As we have noted above, US LEC has elected to forego resolution of the remaining issues under state law. Therefore, the Commission finds that the Arbitration Petition of US LEC should be dismissed so that the parties may proceed before the FCC. It shall be the

Verizon Md. v. PSC of Md., 70 USLW 4432 at 4435.

⁷ "Whether the Commission waived its immunity is another question we need not decide, because - as the same parties also argue - even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of Ex Parte Young, 209 U.S. 123 (1908)." Verizon Md. v. PSC of Md., 70 USLW 4432 at 4435.

responsibility of the parties to serve copies of all pleadings filed herein on the FCC.

Accordingly, IT IS ORDERED THAT:

(1) This case is hereby dismissed without prejudice, consistent with the findings above. This Commission will not arbitrate the interconnection issues under federal law for the reasons set forth in the findings above.

(2) There being nothing further to come before the Commission, this case is dismissed.